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Public Prosecutor v Ahmad Rizal bin Umar

B COURT OF APPEAL (KOTA KINABALU) — CRIMINAL APPEAL NO S-06A-1–08 OF 2014
ZAWAWI SALLEH, PRASAD ABRAHAM JJCA AND ZALEHA YUSOF J
3 AUGUST 2017

C *Criminal Procedure — Acquittal or discharge — Prima facie case not established — Respondent charged with murder — Respondent acquitted and discharged at the end of prosecution's case by trial judge — Whether prima facie case proven*

D *Evidence — Circumstantial Evidence — Standard of proof — Murder — Presence of DNA — Unreliable expert evidence — Whether there was break in chain of exhibits — Whether there was sufficient circumstantial evidence to prove nexus between respondent and deceased's death*

E The respondent was charged with the murder of his intimate friend, Kartini bt Borhan. The respondent claimed that he received a call from a girl and attended to her at home when he saw a robber struggling with her and tried to help her but she and the respondent were wounded. The respondent was examined by Dr Ridwan Hisham ('PW5') of the Orthopedics Department of Keningau
F Hospital where he was found to have suffered serious injuries caused by a sharp object. Surgery was performed on the respondent and the injuries were sutured. The court was informed by the deceased friend and sister that the deceased was having a love affair with the respondent at the same time she was
G in a relationship with Lim Guan Heng ('PW12'). The respondent's DNA together with PW12 and four unknown males were found on various items at the crime scene. These items were analysed by PW24 and PW25, science officers from the chemistry department. 23 footprint impressions were found by Insp Jaimi bin Jamil ('PW21') that were categorised into two patterns. It was
H found by the Assistant Registrar of the Criminal Registration Centre Malaysia ('PW21') that the respondent's footprint impression was similar to those in photographs taken by PW21. At the close of the prosecution's case, the learned trial judge found that the prosecution had failed to establish a prima facie case against the respondent and consequently, the respondent was acquitted and
I discharged without his defence being called. Dissatisfied with the decision, the prosecution filed the present appeal. The issues considered by the court were: (a) whether there was a break in the chain of exhibits; and (b) whether there was sufficient circumstantial evidence to prove the nexus between the respondent and the deceased's death.

Held, dismissing the appeal and affirming the decision of the High Court: A

(1) It was found that a vital link was not accounted for or missing in regards the handling of the exhibits concerned. It was rightly observed by the trial judge when His Lordship concluded that there was a serious break in the chain of evidence affecting proof as to the identity of the exhibits. There B was serious doubt as to whether the exhibits analysed by the chemists were the same exhibits recovered and handed over to the investigation officer ('PW16'). It was found that the preservation of the integrity and identity of the exhibits prior to the items reaching the laboratory had been seriously compromised (see paras 37 & 40). C

(2) The presence of the respondent's DNA at the crime scene left no doubt that the respondent was in the house. That alone however was not enough to implicate the respondent with the murder of the deceased. The existence of four unknown males further hampered the prosecution's case D (see para 48).

(3) There was not an iota of evidence showing that the respondent knew of the deceased's relationship with SP12 to excite the respondent's feeling of jealousy. The court agreed with the findings of the learned trial judge that there was no evidence to show that the respondent was prone or had a E disposition of jealousy (see para 50).

(4) The evidence of Dr Siew Sheue Feng ('PW23') was unreliable as he had no first-hand knowledge on the respondent's injuries and based his opinion only on photographs and cynical examination conducted after F the incident. The photographs depicted wounds which were sutured and did not reflect the actual severity of the injuries sustained by the respondent as they were taken after PW5 had performed surgery on the respondent. It was admitted by PW23 that PW5 would have been in a better position to ascertain the nature and severity of the respondent's G injuries. The evidence of PW23 and the report were lacking in probative value (see paras 53 & 55).

(5) The evidence of the footprint impressions fell short of the standard needed in establishing a prima facie case against the respondent as the H other footprints were unaccounted for and possible involvement of a third party could not be eliminated (see para 57).

(6) Considering the cumulative effect of circumstantial evidence adduced by the prosecution against the respondent, there was no doubt that the I evidence fell gravely short of the standard required by law. The prosecution had failed to establish a prima facie case against the respondent (see para 62).

[Bahasa Malaysia summary

Responden dituduh dengan membunuh kawan rapatnya, Kartini bt Borhan. Responden mendakwa yang dia menerima panggilan daripada seorang perempuan dan semasa ke rumahnya dia nampak perompak bergelut dengannya dan mencuba untuk menolongnya tetapi dia dan responden telah tercedera. Responden diperiksa oleh Dr Ridwan Hisham ('PW5') dari Jabatan Ortopedik Hospital Keningau di mana dia didapati mengalami kecederaan yang serius disebabkan oleh objek yang tajam. Pembedahan dijalankan ke atas responden dan luka dijahit. Mahkamah diberitahu oleh kawan si mati dan saudara perempuan bahawa si mati mempunyai hubungan sulit dengan responden pada masa yang sama dia mempunyai hubungan dengan Lim Guan Heng ('PW12'). DNA responden bersama PW12 dan empat lelaki yang tidak dikenali didapati atas pelbagai barang di tempat jenayah. Barang-barang ini dianalisa oleh PW24 dan PW25, pegawai sains daripada jabatan kimia. 23 jejak tapak kaki didapati oleh Insp Jaimi bin Jamil ('PW21') dikategori kepada dua corak. Ia didapati oleh Penolong Pendaftar Pusat Pendaftaran Jenayah Malaysia ('PW21') bahawa jejak tapak kaki responden adalah sama kepada gambar yang diambil oleh PW21. Di akhir penutupan kes pihak pendakwaan, hakim perbicaraan bijaksana mendapati bahawa pihak pendakwaan telah gagal untuk membuktikan kes prima facie terhadap responden dan akibatnya, responden dibebaskan dan dilepaskan tanpa pembelaannya dipanggil. Tidak puas hati dengan keputusan tersebut, pihak pendakwaan memfailkan rayuan ini. Isu-isu yang dipertimbangkan oleh mahkamah adalah: (a) sama ada terdapat pemutusan dalam rantaian ekshibit-ekshibit; dan (b) sama ada terdapat keterangan keadaan yang mencukupi untuk membuktikan hubungan di antara responden dan kematian si mati.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Ia didapati bahawa hubungan penting tidak dapat dikesan atau hilang berkaitan pengendalian ekshibit-ekshibit berkenaan. Ia telah diputuskan dengan betul oleh hakim perbicaraan apabila Yang Arif memutuskan bahawa terdapat serius pemutusan dalam rantaian yang menjejaskan bukti terhadap identiti ekshibit-ekshibit tersebut. Terdapat keraguan yang serius terhadap sama ada ekshibit-ekshibit yang dianalisa oleh ahli kimia adalah ekshibit-ekshibit yang sama yang diperolehi dan diberikan kepada pegawai penyiasatan ('PW16'). Ia didapati bahawa pemeliharaan integriti dan identiti ekshibit-ekshibit sebelum barang-barang sampai ke makmal telah dikompromi dengan serius (lihat perenggan 37 & 40).

(2) Kehadiran DNA responden di tempat jenayah tidak meragui bahawa responden berada dalam rumah. Itu sahaja walau bagaimanapun tidak cukup untuk membabitkan responden dengan pembunuhan si mati. Kewujudan empat lelaki yang tidak dikenali seterusnya menghalang kes

pihak pendakwaan (lihat perenggan 48).

(3) Tidak terdapat sedikit pun keterangan menunjukkan bahawa responden mengetahui mengenai hubungan si mati dengan SP12 untuk membangkitkan rasa cemburu responden. Mahkamah bersetuju dengan dapatan hakim perbicaraan yang bijaksana abahwa tidak terdapat keterangan untuk menunjukkan bahawa responden adalah mudah cemburu (lihat perenggan 50).

(4) Keterangan Dr Siew Sheue Feng ('PW23') tidak boleh diharap kerana dia tidak mempunyai pengetahuan langsung ke atas kecederaan responden dan berdasarkan pandangannya sahaja atas gambar-gambar dan pemeriksaan sinis yang dilakukan selepas kejadian. Gambar-gambar menunjukkan luka yang dijahit dan tidak membayangkan keseriusan sebenar kecederaan yang dialami oleh responden kerana ia diambil selepas PW5 melaksanakan pembedahan ke atas responden. Ia diakui oleh PW23 bahawa PW5 adalah dalam kedudukan yang baik untuk menentukan sifat dan teruknya kecederaan responden. Keterangan PW23 dan laporan kekurangan nilai probatif (lihat perenggan 53 & 55).

(5) Keterangan jejak tapak kaki tidak mencapai standard yang diperlukan dalam membuktikan kes prima facie terhadap responden kerana tapak kaki-tapak kaki lain tidak dapat dikesan dan kemungkinan penglibatan pihak ketiga tidak boleh dihapuskan (lihat perenggan 57).

(6) Mempertimbangkan kesan kumulatif keterangan keadaan yang dikemukakan oleh pihak pendakwaan terhadap responden, tidak terdapat keraguan bahawa keterangan tersebut tidak mencapai standard yang dikehendaki oleh undang-undang. Pihak pendakwaan telah gagal untuk membuktikan kes prima facie terhadap responden (lihat perenggan 62).]

Notes

For cases on prima facie case not established, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 157–159.

For cases on standard of proof on circumstantial evidence, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1151–1165.

Cases referred to

Belhaven and Stenton Peerage (1875) 1 App Cas 278, HL (refd)

Chan Chwen Kong v PP [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)

Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ Rep 101, FC (refd)

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (refd)

Idris v PP [1960] 7 MLJ 296, CA (refd)

Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)

Mazlan bin Osman v PP [2012] 9 MLJ 703; [2013] 1 AMR 615, HC (refd)
Ong Chen Tow v Regina [1963] 1 MLJ 160 (refd)
PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161; [2008] 4 CLJ 1, FC (refd)
PP v Loo Seng Yip [2004] 8 CLJ 496, HC (refd)
R v Larsen 2001 BCSC 597 (refd)
R v Stafford [2009] QCA 407, CA (refd)
S v Noble 2002 NR 67, HC (refd)
Sia Soon Suan v PP [1966] 1 MLJ 116, FC (refd)
Sunny Ang v PP [1966] 2 MLJ 195; [1965] 1 LNS 171, FC (refd)

Legislation referred to

Evidence Act 1950 s 8

Appeal from: Criminal Trial No BKI-46–1/6 of 2012 (High Court, Kota Kinabalu)

Hanim bt Mohd Rashid (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ram Singh (Ridwadeen M Borhan with him) (Ram Singh Harban & Co) for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

INTRODUCTION

[1] The respondent, a police inspector, was charged and tried before the Kota Kinabalu High Court with the murder of one Kartini bt Borhan, his intimate friend. The charge read as follows:

> That you on the 29th day of September 2011 between the hours of 4am and 5am, in the house located at Lot 7, Phasa 5, Taman Adika, Keningau, in the District of Keningau, in the State of Sabah, did commit a murder by causing a death to one Kartini bt Borhan (NRIC 840512–12–6008) and thereby committed an offence punishable under s 302 of the Penal Code.

[2] At the close of the prosecution's case, the respondent was acquitted and discharged by the learned trial judge without his defence being called ('impugned order').

[3] Aggrieved by the said order of acquittal and discharged, the public prosecutor ('PP') has now appealed to this court urging the reversal of the said impugned order.

[4] We have heard learned deputy public prosecutor ('DPP') and learned counsel for the respondent at some length. We have also carefully perused the written submissions and gone through the record of appeal in its entirety. For the reasons that follow, we found the appeal was devoid of merits and accordingly we dismissed the appeal by the learned DPP and affirmed the decision of the learned trial judge.

THE FACTUAL BACKGROUND

[5] The facts of the case have been fully set out by the learned trial judge in his grounds of judgment. We do not wish to regurgitate except for the relevant facts that are germane to the disposal of this instant appeal.

THE PROSECUTION'S CASE

[6] On 29 September 2011, at about 5.10am, the respondent arrived at IPD Keningau and sought help from Cpl Jasni Jualis ('PW1') and L/Cpl Kristin to save a woman who was allegedly severely injured in an alleged robbery. The respondent was shirtless and covered in blood.

[7] PW1, L/Cpl Kristin and the respondent then drove to the scene at the address mentioned in the charge. Upon arrival at the scene, PW1 and L/Cpl Kristin entered a single-storey house. They found the deceased lying on her back at the living room. The deceased was covered with blood. The deceased was brought to the Emergency Ward at Keningau Hospital. Dr Ooi Kok Min, ('PW3'), the medical officer attached to the Keningau Hospital, tried to resuscitate her but failed and she was then pronounced dead.

[8] On 30 September 2011, Dr Jessie Hiu ('PW2'), conducted a post-mortem on the deceased at Queen Elizabeth Hospital and prepared a post-mortem report ('P5'). She found one stab wound on the deceased's face, another one on the deceased's chest directed downward cutting the ribs, muscles, left lung, the covering of the heart and penetrated the heart from the top right to the bottom of the heart. There was one incised wound on the front of left forearm while other injuries were bruises, abrasions on the chest, left thigh and knees. She opined that it was the stab wound on the chest that caused the deceased's death. PW2 also collected blood samples, the deceased's finger nails scrapping and clippings, eight strands of hair, vaginal, anal, oral swabs and the deceased's clothing for further investigation.

[9] Dr Ridwan Hisham ('PW5') who was attached to the Orthopaedics Department of Keningau Hospital testified that he examined the respondent on 29 September 2011 after the respondent was referred to him by PW3. PW5 prepared a medical report ('P21'). The respondent was found to have a 4cm

wound at the hypothenar region of his palm, a 1cm wound on his right chest, a wound at his right knee, a stab wound at his right neck and the shoulder muscles partially cut, a 3cm wound in mid-back close to the spine, a 4cm wound at left paravertebral at mid-back, a wound at left axilla tract which runs downward towards the centre of the body from posterior nipple line. The injuries were considered serious and it was due to a contact with a sharp object. PW5 had performed surgery and the injuries were satured. The injuries sustained by the respondent were recorded by Detective Steven Ak Tani ('PW4') on 2 October 2011. The photographs were produced as P13(1)–13(7).

[10] Inspector Razlan bin Abdul Razak ('PW20'), the Head of the Forensic Team IPK Sabah, visited the crime scene on 29 September 2011 and collected exhibits for chemical analysis. Among the 17 exhibits taken were various swabs of blood, three cigarette butts on the cement floor at the car porch, swab of urine, one Nike shoe, one white bag, one cigarette butt from a rubbish bin, DVD/VCD, a beer can, saliva swab, a towel, a night dress and a white t-shirt. He prepared the forensic examination report ('P40').

[11] Inspector Jaimi bin Jamil ('PW21') conducted further examination at the crime scene on 4 October 2011 and collected exhibits for chemical analysis. Among the exhibits taken were various swabs of blood, a sanitary pad, a plastic bottle cap, a silver necklace, mattress cover, slippers and toothbrushes. He also prepared the forensic examination report ('P42'). On 11 October 2011, PW21 conducted further examination on the footprints. D/Cpl Manzoor Hussien ('PW22') took 65 photographs of the footprints which were produced as P30(1)–P30(65).

[12] The items were analysed by science officers from chemistry department, Abdul Razak Mohd Iman ('PW24') and Zahila bt Suadi ('PW25'). PW25 found that the respondent and the deceased were the contributors of the mixed DNA profiles on cotton swab 'A6', nightdress 'A16', bottle cap 'C2', sanitary pad 'C1' and hair 'K6a'. PW25 also found that four unknown males, the respondent and Lim Guan Heng ('PW12') were contributors of the DNA profiles on various items ie cigarette butts 'A3i', 'A4', 'A11', mattress cover 'C9', toothbrushes 'C13b', 'C13c' and 'C13d'.

[13] On 2 October 2011, the respondent lodged a police report ('P35') and claimed that he received a call from a girl and attended to her at her home. He saw a robber struggling with her and tried to help her but she and the respondent were wounded.

[14] The respondent was later charged for the murder of the deceased.

[15] The prosecution called 25 witnesses. PW9, the deceased's neighbour, claimed that she was awakened on that fateful day by sounds and scream from the deceased's house.

[16] Azlyanna bt Sadiken, ('PW7') the deceased's friend and Hasnizah bt Borhan, ('PW11') the deceased's sister, informed the court that the deceased was having a love affair with the respondent. The deceased was also in a relationship with PW12.

[17] The investigation officer ('PW16') explained that all exhibits involved in this case had been destroyed as a consequence of a fire which broke out at the exhibits store in IPD Keningau on 26 April 2013. PW16 lodged a police report dated 17 June 2013 ('P31') with a list of exhibits ('ID31A') annexed to the said report.

FINDINGS OF THE HIGH COURT AT THE CLOSE OF THE PROSECUTION'S CASE

[18] At the close of the prosecution's case, the learned trial judge found that the prosecution had failed to establish a prima facie case against the respondent.

[19] According to the learned trial judge, the circumstantial evidence adduced by the prosecution was insufficient to prove that the respondent had killed or caused bodily injuries that would lead to her death.

[20] The learned trial judge was of the opinion that the respondent's police report ('P35') may probably be a fabricated version which may be calculated to cover up something. However, this fact alone was insufficient to establish conclusively or irresistibly that the respondent had done so to cover his commission of the crime.

[21] The learned trial judge rejected the DNA evidence as there was a break in chain of the exhibits analysed by the chemists ('PW24' and 'PW25').

[22] According to the learned trial judge, the presence of the respondent at the scene of the crime was not in dispute. Therefore, the mere existence of two footprints of the respondent alone at the scene cannot be irresistibly inferred that the respondent was the person who had committed the killing or causing or inflicting the fatal injuries on the deceased. There were many footprints and there was no explanation on that.

[23] The learned trial judge also found that the respondent had no motive to kill the deceased. On the purported triangular love affair, there was no evidence

to show any purported quarrels, fight or animosity or indication of jealousy between the deceased, the respondent and PW12. In fact, on that fateful morning, the neighbours did not hear any quarrel before the screaming.

THE APPEAL

[24] Before us, the impugned order was challenged on two main grounds:

(a) that the learned trial judge had erred when His Lordship held that there was a break in chain of the exhibits; and

(b) that the learned trial judge had erred when His Lordship failed to evaluate the evidence in totality.

[25] We will deal with each of the grounds advanced by the DPP in turn.

GROUND (a): BREAK IN CHAIN OF THE EXHIBITS

[26] As alluded to earlier, PW24 had examined the exhibits at the scene and had taken photographs of the exhibits which were produced as P52(A)–(M), P53(A)–(C), P54, P55(1)–(47), P56(A)–(Q), P57(1)–(7), P58(1)–(17), P59(1)–(47), P60(1)–(3) and P61(1)–(2). Similarly, PW25 also had taken photographs of all the exhibits which she had conducted for the purpose of DNA analysis. These photographs showing the respective exhibits were produced as P67(1)(A1), P67(2)(A2), P67(3)(A3)–P67(15)(A17), P68, P69(1)(C1), P69(14)(13), P69(8)(C8), P69(8)(C8a), P70(1)(E8)–P70(4)(E6), P71(1)(F1)–P71(6)(F6), P72(1)(G2)–P72(2)(G3), P73, P74(1)(K1)–P74(15)(K15), P75(1)(R1)–P75(7)(R7) and P76(1)(S1)–P76(25)(S25).

[27] Learned DPP mounted a frontal attack on the findings of the learned trial judge in rejecting the DNA evidence. The DNA evidence should not have been rejected simply on the ground that PW2, PW20 and PW21 did not identify the photographs taken by PW24 and PW25. According to the learned DPP, PW2, PW20, PW21, PW24 and PW25 had each explained the markings placed by each of them on the exhibits. There was also a reasonable explanation proffered by PW16 as to how the exhibits were destroyed.

[28] Now, our courts have time and again emphasised that it is essential for the prosecution to prove that the exhibits collected or recovered from the scene of crime are the very same exhibits submitted for laboratory examination or analysis. The underlying purpose of testimony relating to the chain of custody is to prove that the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court. Proof of

continuity is not a legal requirement and gaps in continuity are not fatal to the prosecution's case unless they raise a reasonable doubt about the exhibit's integrity. There is also no specific requirement that every person who may have possession of the exhibit during the chain of custody should himself or herself give evidence. It is a question of fact for the court to determine whether or not the DNA result is accurate because of the possibility that security or continuity was not maintained (see *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551; *R v Larsen* 2001 BCSC 597; *R v Stafford* [2009] QCA 407).

[29] Let us now examine the facts in relation to the chain of custody of the exhibits in question. The material evidence on this issue are that of PW2, PW16, PW20, PW21, PW24 and PW25. PW2 testified that she had collected specimens and handed them to PW16 who acknowledged receipt through P7(A). PW2 also prepared a form requesting for forensic or toxicology examination ('P7'). PW2 further explained that the deceased's blood sample for DNA profiling was on the FTA card. The blood for ABO Grouping was in the blood tube. The nail scrapings and nail clippings were in the envelopes. The hair was put in separate plastic containers.

[30] According to PW2 those specimens and items were sealed and marked so that she would be able to identify them. It is pertinent to note that PW2's oral testimony and the documentary evidence in respect of P7 and P7A made no mention of the markings that were placed on exhibits.

[31] PW20 testified that on 29 September 2011, exhibits marked '1'–'17' were recovered and photographed. PW20 also lifted two fingerprints (marked 'C1' and 'C2'). The photographs showing the respective exhibits were produced as P9(10)–P9(28). It could be seen from the photographs that a yellow crime scene identifying number card was placed nearby the respective exhibit. PW20 packaged the exhibits and handed them to PW16 who acknowledged receipt through P40.

[32] PW21 further testified that on 4 October 2011, exhibits marked '1'–'13' were recovered and photographed. PW21 also took 25 blood sample swabs and they were marked 'S1'–'S25'. The seven strands of hair were marked 'R1'–'R7'. The photographs showing the respective exhibits were produced as P17(1)–P17(75). It could be seen from the photographs that crime scene identifying marker was placed nearby the respective exhibit. PW21 testified that he packaged the exhibits and handed them to PW16 who acknowledged receipt through P43.

[33] PW16 in his testimony confirmed that he received the exhibits from PW20 on 29 September 2011. On 30 September 2011, at 7am, PW16 went to

A the hospital and witnessed the post-mortem. PW16 took the respondent's blood sample at about 5pm on the same day. PW16 sent the exhibits to PW24, together with a few forms requesting chemical analysis, POL 31 (P36A–C). The description of the exhibits and the markings were stated in P36A–C. However, PW16 could not recall the actual date he sent the exhibits to the B chemistry department.

[34] PW24 testified that he received seven packages marked 'AI', 'AII', 'C1', 'D', 'E' and 'F' from PW16 on 11 October 2011 and issued receipt P48. On 21 October 2011, PW24 received three envelopes marked 'CII', 'G' and 'H' C from PW16 and issued receipt P49. PW24 conducted test and examination and prepared a report P51 dated 16 November 2011. All the exhibits were returned to PW16 on 25 November 2011 together with the report. On 3 January 2012, PW24 received a package marked 'I' from PW16 and issued D receipt P50. PW24 conducted test and examination and prepared a report P62 dated 9 January 2012. On 29 February 2012, all the exhibits contained in package 'I' were returned to one Insp Khairu Amra bin Haron.

[35] PW25 testified that she received 82 envelopes and eight packages from E PW16 on 2 December 2011. She had issued receipt ('P65'). PW25 conducted test and examination and prepared a report ('P66') dated 8 March 2012. All the exhibits were returned to ASP Taruna bin Madian ('PW19') together with the report.

F **[36]** The sample of blood alleged to be of the respondent was referred to as 'E4c' in the chemist report ('P66'). The respondent's DNA profile was found on cotton swab 'A6', nightdress 'A16', bottle cap 'C2', sanitary pad 'C1' and hair 'K6a'.

G **[37]** We have tooth-combed the evidence on the chain of custody of the exhibits. Notwithstanding the detailed testimonies of witnesses regarding the handling of the exhibits concerned, we found some vital link was not accounted for or missing. The point was rightly observed by the learned trial H judge when His Lordship concluded that there was a serious break in the chain of evidence affecting proof as to the identity of the exhibits. We entertained serious doubt whether in fact the exhibits analysed by PW24 and PW25 were the same exhibits recovered and handed over to PW16. We will elaborate on this point in the following paragraphs.

I **[38]** The specimen of the respondent's blood ('E4a') was taken so that a comparison can be made with the exhibits recovered from the crime scene. However, the prosecution did not adduce evidence to establish the fact who actually took the sample of blood from the respondent, how and when.

Further, there was also no evidence to show on how the sample of blood was preserved and kept until it was handed to PW16.

[39] There was no evidence adduced by the prosecution to show exactly what had happened to the exhibits between the time of handing over by PW2, PW20 and PW21 to the investigation officer ('PW16') and the subsequent examination by the chemist. It was not disputed that PW16 was given custody of the exhibits. However, there were nagging questions about what did PW16 do with the exhibits after he receive them from PW2, PW20 and PW21; where did he keep them; were they kept under lock and key; who placed the markings on the exhibits; and did PW24 and PW25 received the very same exhibits that were recovered by PW2, PW20 and PW21.

[40] After an assiduous review of the evidence on record, we found the preservation of the integrity and identity of the exhibits prior to the items reaching the laboratory had been seriously compromised.

[41] In the circumstances, the learned trial judge was correct in rejecting the evidence of PW25 on the DNA profiling and the comparison made with the view to implicate the respondent.

[42] On these reasons, the first ground raised by the learned DPP must fail.

GROUND (b): NONE APPRECIATION OF THE PROSECUTION'S EVIDENCE

[43] Learned DPP vehemently contended there are sufficient circumstantial evidence that proved the nexus between the respondent and the deceased's death and a prima facie case against the respondent has been made out. The evidence may be summarised as follows:

(a) that there was no sign of any break into the deceased's house suggesting that her killer was someone known to her;

(b) the respondent's DNA profile was found on cotton swab 'A6', nightdress 'A16', bottle cap 'C2', sanitary pad 'C1' and hair 'K6a';

(c) the respondent had motive to kill the deceased due to jealousy;

(d) the respondent had injured himself;

(e) the respondent had lodged a false police report; and

(f) the respondent's foot print impression was found at the crime scene.

[44] The prosecution's case is based entirely on the circumstantial evidence. Concerning the heavy onus placed by the law on the prosecution when relying on circumstantial evidence, the following passages are definitive and this court need not add any further. In the House of Lords case of *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 at p 279, Lord Cairn remarked:

> My Lords in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[45] Hill Ag CJ in *Idris v Public Prosecutor* [1960] 1 MLJ 296 had this to say:

> In other words circumstantial evidence consist of this: that when you look at all surrounding circumstances, you find such a series of undersigned, unexpected, coincidences that, as a reasonable person, you will find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.

(See also *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22; *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, *Mazlan bin Osman v Public Prosecutor* [2012] 9 MLJ 703; [2013] 1 AMR 615.)

[46] The principles distilled from the cases cited above seem to be this, that for a conviction to be based on circumstantial evidence, the circumstances must unerringly lead to one conclusion consistent only with the hypothesis of the guilt of the accused and every incriminating circumstances must be clearly established by reliable and clinching evidence. Circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible. In other words, in order to secure conviction based on circumstantial evidence, there must not be any other co-existing circumstances which would weaken or destroy the inference of the guilt of the accused. That fact must be such that they cannot be accounted for any other rational hypothesis, other than the guilt of the accused.

[47] We have already given our reasons why we rejected the DNA evidence adduced by the prosecution. Now, even if we were to assume for the sake of argument that scientific evidence ought to have been accepted by this court, at its highest, the discovery of respondent's DNA may have created suspicion of his guilt but not enough to prove his guilt. In this context, Zaki Azmi PCA (as

His Lordship then was) explained in the case of *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161; [2008] 4 CLJ 1:

> Therefore it is only when a person is identified and the DNA matches that of the identified person can it be of any use towards solving a crime investigation. But even then the prosecution needs to go one step further to show that the DNA of the suspect (together with any other evidence) is such that it points to one conclusion only, ie that the offence was committed by the suspect.

[48] The presence of the respondent's DNA at the crime scene left no doubt that the respondent was in the house but it is not enough to implicate the respondent with the murder of the deceased. The existence of four unknown males had further hampered the prosecution's case.

[49] Now, we turn to motive. In a criminal prosecution, it is not incumbent upon the prosecution to prove the motive for a crime. However, when a case is based on circumstantial evidence, the motive behind a crime assumes greater importance as it is an important strand of circumstantial evidence to impute the accused's guilt. In the two leading cases where, based on circumstantial evidence, a conviction for murder was upheld, the motives for the killings were clearly established. In *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171, it was clearly established that the accused committed the murder so as to benefit from some insurance policies which had recently been taken out in the deceased's name. Likewise in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ Rep 101 it was established that the motive for the killing was political rivalry and ambition.

[50] In this instant appeal, the prosecution alleges only one motive, ie jealousy, which the learned trial judge found to be non-existent. It was the prosecution's case that the deceased had two lovers simultaneously and the evidence of SP12 was introduced towards this end. However, there was not an iota of evidence showing that the respondent in fact knew of their relationship to excite the respondent's feeling of jealousy. In the circumstances, we agreed with the findings of the learned trial judge that there was no evidence to show that the respondent is prone to jealousy or had such a disposition.

[51] The prosecution sought to adduce evidence through Dr Siew Sheue Feng ('PW23') that the injuries suffered by the respondent were self-inflicted. PW23 had examined the respondent on 24 October 2012 and photographs P13(1)–13(7) were given to PW23 for the purpose of his assessment. PW23 prepared a report ('P39') in which he expressed his opinions that the injuries sustained by the respondent were inconsistent with combative encounter and were possibly self-inflicted. Based on P39, learned DPP submitted that the conduct of the respondent in injuring himself was a relevant fact pursuant to s 8

of the Evidence Act 1950 and the defence should be called for the respondent to explain why he injured himself.

[52] It is trite that an expert witness must give reasons for his conclusions (see *Public Prosecutor v Loo Seng Yip* [2004] 8 CLJ 496). In this regard, PW23 had testified in great detail the reasons for his conclusion. We observed that the learned trial judge was very critical of the manner in which PW23 gave his evidence. PW23's opinion in respect of the nature and severity of the injuries sustained by the respondent, according to the learned trial judge, was highly questionable and no weight should be accorded. In this context, in the case of *Dato' Mokhtar Hashim*, Hashim Yeop Sani FJ had this to say:

> Human judgment is fallible and human knowledge is limited and imperfect. Moreover it is also not uncommon that an expert witness, however impartial he may wish to be is likely to be unconsciously prejudiced, in favour of the side which calls him. This is the area of caution that the court must always bear in mind assessing the evidence of an expert.

[53] Having scrutinised the evidence of PW23 and the grounds of judgment, we were satisfied that the findings of the learned judge was correct in law and should be accepted. In our considered opinion, PW23's evidence was unreliable as he had no first hand knowledge on the matter and was basing his opinion on photographs P13(1)–13(7) and cynical examination conducted long after the incident. The photographs were taken after PW5 had performed surgery. Those photographs depict wounds that were sutured and do not reflect the actual severity of the injuries sustained by the respondent.

[54] In the case of *Ong Chen Tow v Regina* [1963] 1 MLJ 160, Wilson J had this to say on an expert who had no first hand knowledge or experience on the matter:

> The learned district judge also rejected the evidence of the expert on the ground that it was extremely biased against the prosecution and bordered on the ridiculous as he was basing his opinion on two visits to the scene long after the accident and after examining the same materials as were already before the court. The learned district judge held that the factual evidence was a simple and straight forward nature and with this I cannot agree.

[55] Further, PW23 himself had admitted that PW5 would be in a better position to ascertain the nature and severity of the respondent's injuries. Considering the nature of the evidence proffered by PW23, we must say that the evidence of PW23 and the report ('P39') were lacking in probative value for the reasons we have adumbrated earlier.

[56] It is pertinent to note that the purpose of expert evidence of fact (eg observation, test, calculation) and opinion is to assist the court in areas of science or other technical matters upon which the court cannot be expected to form a view without expert assistance. Nevertheless, the ultimate decision on the matters about which the expert was expressed an opinion remains one for the court and not for the expert. It is always for the court to decide the fact in the light of the evidence as a whole. Whilst the court must, of course, pay due regard to the expertise of an expert witness, the court is neither obliged to agree with him or her, nor obliged to share doubts or reservations expressed by him or her.

[57] As stated earlier, the learned trial judge had held that the police report ('P35') lodged by the respondent may be fabricated to cover up something. Although the report might be incriminating against the respondent, we agreed with the learned trial judge's findings that this does not necessarily lead to an irresistible inference that the respondent had committed the crime. There must be other circumstances that may go to show that the respondent alone had committed this murder. Learned DPP submitted that there was scientific evidence to prove that the respondent had committed the offence. According to PW21, he found 23 footprints impressions that could be categorised into two patterns. PW15, the Assistant Registrar of the Criminal Registration Centre Malaysia, found that the respondent's footprint impression ('P29A' and 'P29B') were similar to the footprints shown in photographs P30(39) and P30(41). We disagreed with the submission on the ground that the other footprints were unaccounted for. Without the elimination process to rule out the possible involvement of third party, this piece of evidence fell short of the standard needed in establishing a prima facie case against the respondent.

[58] Finally, learned DPP submitted that the learned trial judge erred and/or misdirected himself in failing to evaluate the prosecution's evidence in totality.

[59] It is trite that in assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality.

[60] The court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to the drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused in entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way: the prosecution must satisfy the court, not that each

separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.

[61] In our view, the learned trial judge delivered a well-reasoned judgment which accounted for all the proven facts. We could not detect any misdirection on fact and law by the learned trial judge. We must bear in mind that no judgment can ever be perfect and all-embracing. As stated in the South Africa case of *S v Noble* 2002 NR 67 (HC):

> No judgment can ever be 'perfect and all embracing, and it does not necessarily follow that, because something has not been mentioned therefore it has not been considered'. (See *S v De Beer* 190 NR 379 (HC) at 381 — J quoting from *S v Pillay,* 1977 (4) SA(a) at 534H – 535G and *R v Dhlumayo and Others* 1948 (2) SA 677 (A) at 706) ...

[62] Having considered the cumulative effect of the circumstantial evidence adduced by the prosecution against the respondent, we have no doubt in our mind that such evidence fell gravely short of the standard required by the law. The prosecution had evidently failed to establish a prima facie case against the respondent. We refer to the decision of the Federal Court in *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116 holding (3):

> (3) the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else and therefore the appeal must be allowed and the conviction quashed., and to the judgment of Ong Hock Thye AG CJ (Malaya) as he then was and we quote at p 118 holding F-1:
>
> > In the circumstances, had counsel's application for further cross-examination of the prosecution witness been permitted, it might well have brought out into greater relief the break in the chain, so that it could not have been passed over. It is impossible for us to say that in the circumstances the denial of the application might not have occasioned a miscarriage of justice. We appreciate that on the day of the Pontian landing there must have been great confusion when routine procedural machinery was jammed, if not broken down by the rush of exciting and grave events. We must accordingly exonerate all police and military personnel as well as the public prosecutor's officers from any sort of blame for the flaws which had developed in the prosecution case. Nevertheless, the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else. This is axiomatic. The directions that we give a jury are no less to be hearkened to by ourselves.

CONCLUSION

[63] For the foregoing reasons, the appeal must fail and accordingly we dismissed the appeal and affirmed the decision of High Court. So ordered.

Appeal dismissed; decision of High Court affirmed.

Reported by Fatin Mohd Ismail